



# WORLD HEALTH ORGANIZATION

**EXECUTIVE BOARD**  
**103rd Session**  
**Provisional agenda item 7**

**EB103/34**  
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## **Amendment to Article 73 of the Constitution**

### **Report by the Secretariat in consultation with an informal group of Board members**

1. At its 101st session the Executive Board considered the report of the special group for the review of the Constitution of WHO.<sup>1</sup> The special group had proposed a revision to Article 73, dealing with the procedure for amending the Constitution, with a view to speeding up the often lengthy period between adoption of an amendment and its entry-into-force upon acceptance by two-thirds of the Members of WHO. After considering this proposal, the Board requested the Director-General to submit a study of the legal situation in other organizations of the United Nations system concerning entry-into-force of amendments, and to propose solutions consistent with international law.
2. After considering the report by the Director-General at its 102nd session,<sup>2</sup> the Board requested that an informal working group of interested Board members - using electronic means of communication - should consider various questions raised by Board members with respect to a proposed amendment to Article 73 on entry-into-force of amendments as contained in that report. A list of potentially interested members was read out by the Secretariat on behalf of the Chairman, with a request for these and any others interested in participating in the discussions to confirm to the Secretariat their willingness to take part in the group. On this basis, the group consisted of Dr A. Alvik (Norway), Mr N. Boyer as alternate to Dr J. Boufford (United States of America), Dr A. Juneau (Canada), Dr A. Sulaiman (Oman), Mr H. Voigtländer (Germany) and Mr J. Williams (Cook Islands).
3. As a working method, the Secretariat provided the members of the group with an initial draft document elaborating on the issues, as a basis on which comments could be made and shared with other members by e-mail or otherwise. In practice, communications were done by a combination of e-mail and telefax. The following paragraphs reflect the original analysis of the issues and the comments made by members of the group on that initial draft.
4. The proposal for Article 73 contained in the Director-General's report consisted of creating three categories of possible amendments to the Constitution, which would in turn affect whether - and what proportion of - the Organization's membership should subsequently accept the adopted amendment before it could enter into force. The proposal is set forth below:

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<sup>1</sup> Document EB101/1998/REC/1, Annex 3.

<sup>2</sup> Document EB102/3.

**Category 1:** If a proposed amendment is adopted by the Health Assembly by a vote of three-quarters (of the Members), and does not concern a change in the objective of the Organization and/or such other category of amendments as may be agreed, it shall enter into force immediately.

**Category 2:** If a proposed amendment is adopted by the Health Assembly by a vote of three-quarters (of those present and voting), it shall enter into force upon acceptance by a majority of the Members.

**Category 3:** If a proposed amendment is adopted by the Health Assembly by a two-thirds majority vote (of those present and voting), it shall enter into force upon acceptance by two-thirds of the Members.

This is the existing method under Article 73 of the Constitution.

5. The questions raised by Board members, as summarized by the Chairman, are set forth below, together with a response.

#### **What categories of constitutional amendment should be distinguished?**

6. As can be seen from the proposal considered by the Board, the division into categories is based primarily on the level of vote the amendment received when adopted by the Health Assembly. However, in the case of category 1 (those amendments which would not require subsequent acceptances by Member States in order to enter into force), the nature of the amendment is also relevant. However, there was a feeling by several members that there should be a clear understanding in advance of all the types of amendments that would constitute this category.

7. Category 1, as currently structured above, lists only one type of amendment for which the substantive characteristics have been specified (in exclusionary terms), namely, that the amendment does not concern a change in the objective of the Organization. As pointed out in the previous report of the Director-General, those organizations of the United Nations system that provide for a separate category of amendments not requiring subsequent acceptance by Member States (FAO, UNESCO and WMO) also include within this category amendments that do not involve "new obligations" for Members. In all such organizations, the determination of whether an amendment creates new obligations is made by the governing body itself. An example of such an amendment would be one creating an obligation to make contributions to an organization that was previously funded purely by voluntary contributions.

8. If the above characteristic is added to category 1, namely amendments not involving new obligations for Members, then - together with the existing characteristic that the amendment does not concern a change in the objective of the Organization - this list would encapsulate all substantive characteristics listed by the three other organizations having this category of amendment procedure. Nevertheless, additional possibilities for substantive characteristics of amendments that could be excluded from the first category could be amendments: (i) affecting the intergovernmental nature of the Organization; (ii) altering the authority of the Director-General, the Health Assembly and/or the Executive Board; and (iii) altering the method of amending the Constitution.

9. In a Constitution such as WHO's, which is primarily organizational in nature (dealing with the structure of the Organization), it may be questioned what amendments to **existing** provisions would be an amendment creating a new obligation. The Health Assembly to date has adopted the following amendments: (i) in 1959, 1967, 1976, 1986 and 1998, to expand the size of the Executive Board

(Articles 24 and 25); (ii) in 1965, to introduce the possibility to suspend or exclude Members deliberately practising a policy of racial discrimination (Article 7); (iii) in 1973, to introduce a biennial budget (Articles 34 and 55); and (iv) in 1978, to make Arabic an authentic text of the Constitution (Article 74). Although under the proposal, the question whether an amendment would qualify for category 1 treatment would be for the Health Assembly to decide, it may be argued that none of the amendments adopted so far by the Health Assembly would create new obligations for Members or concern a change in the objective of the Organization. Thus, they all could qualify for category 1 treatment.

### **When would it be decided to which category a proposed constitutional amendment belonged?**

10. This question may best be considered by way of a series of examples, as set forth below. As described above, only amendments not having specified substantive characteristics (not creating new obligations and not concerning a change in the objective of the Organization) would qualify for possible category 1 treatment. Thus, the Health Assembly must decide - before resolving whether or not to adopt the proposed amendment - whether it has any of these characteristics.

11. As a first example, there might be a proposal to increase the Executive Board to 35 members. Assuming the Assembly agreed, either by a formal vote or by consensus, that the proposal did not impose a new obligation on Members and that it does not change the objective of the Organization, the category into which the proposal - if adopted by the Assembly - would fall would depend entirely on the size of the vote it received.

- If it received a number of votes equivalent to - or more than - three-quarters of the Members of the Organization (i.e. 75% of 191 Members, or 144 votes), then no subsequent acceptances would be required for it to enter into force.
- If it only received a vote equal to three-quarters of those present and voting (or more, but less than the 144 required for the first category), it would be necessary for a majority of the Members of the Organization (i.e. 96 Members) to submit an acceptance of the amendment.<sup>1</sup>
- If it received less than three-quarters of the votes but equal to - or more than - two-thirds of those present and voting, it would only satisfy the requirements of category 3 and thus would not enter into force until two-thirds of the Members of the Organization (128 Members) submitted subsequent acceptances.<sup>2</sup>

12. A second example could be a proposal to insert a new provision in the Constitution requiring all Members to ban tobacco advertising. Assuming the Health Assembly agreed, either by a formal vote or by consensus, that the proposal would impose a new obligation on Members (as would seem to be the case), it would be excluded from the procedure available in category 1 and, depending on the size of the vote received in the Health Assembly when adopting the proposal, it would need to be accepted by either a majority of the Members (96) under category 2, or two-thirds of the Members (128) under category 3.

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<sup>1</sup> Assuming there are 180 Member States attending a Health Assembly, it is not unusual for a vote to occur where there are only 120 Members present and voting (casting an affirmative or a negative vote, abstentions not counting as a vote). This would mean that the proposed amendment could be adopted by 90 votes. Thus, if it received somewhere between 90 and 143 votes, it would fall within category 2.

<sup>2</sup> Using the same number of present and voting as in the previous footnote, this would mean that it might only receive somewhere between 80 and 89 votes.

Of course, if the proposal did not receive at least a two-thirds majority vote of those present and voting, it would not be adopted.

13. As can be seen from the above examples, the division into categories depends partly on whether the nature of the proposed amendment qualifies it for category 1, which should be determined by the Health Assembly prior to voting on whether to adopt the proposal, and in part automatically by the size of the vote in the Health Assembly when the amendment is actually adopted. Only certain types of amendments could qualify for category 1 treatment, but all types could qualify for category 2 and 3 treatment.

14. There was little or no support expressed by the members of the group for the maintenance of category 1. It was felt by those who expressed an opinion on the issue that situations may too easily arise where a large majority could be obtained during “the heat of the moment” for a particular amendment, but which - after reflection - might not be viewed so favourably. In addition, many amendments might qualify for category 1 treatment, in that they do not involve creating new obligations for Members and do not involve a change in the objective of the Organization, but they might well involve considerable additional obligations on the Organization in terms of expense.

15. It was also felt that trying to define substantive categories of amendments eligible for consideration under category 1 could be the cause of difficulties. It was suggested that instead of trying to define such categories, it might be preferable to identify the articles of the Constitution, the amendment of which could qualify for category 1 treatment. Although in some circumstances this approach might be simpler, it would need to be recognized that even if the text of an article were currently of a category 1 type, new text added to it might itself create new obligations on Member States or change the objectives of the Organization, notwithstanding the tenor of the original language of the article. In addition, this approach would not deal with the insertion of new articles.

**Which categories should be subject to the provisions of category 1, bearing in mind that it might be difficult for Member States to accept certain amendments to the Constitution of WHO without specific ratification by their own parliaments?**

16. This question has already been addressed in part by the preceding sections. However, the issue of whether certain Member States might have difficulty in accepting certain amendments to the Constitution without specific ratification by their own parliaments merits further consideration.

17. As the Constitution currently reads, amendments will enter into force for all Members when adopted by a two-thirds vote of the Health Assembly and accepted by two-thirds of the Members in accordance with their respective constitutional processes. Thus, Member States are currently in a situation in which an amendment affecting them might enter into force even though they did not vote for it or submit an acceptance. Nevertheless, it was observed by some members of the group that the current situation was already an exception to traditional international law, based on the principle that all Member States have to ratify amendments to an international treaty before they can be bound by the change, and thus it was not considered desirable to go beyond the already reduced degree of protection afforded to Member States in the present Article 73. Although one member felt that in order to find a way to speed up entry-into-force of amendments, the use of category 2 was a possibly acceptable compromise, another member felt that even this category was not an acceptable option.

18. On a related point, one member felt that in the case of any amendment creating new obligations on Member States, regardless of which of the three categories were used, the approach of the FAO Constitution was a good one, namely, that such amendments should only enter into force with respect to

those Members actually accepting the amendment. Another member expressed the view that this was not a good solution.

**What would be the time-frame for entry-into-force and what arrangements would there be to follow up ratification?**

19. As for the time-frame for entry-into-force of amendments, those amendments falling within category 1 would enter into force upon adoption by the Health Assembly. As for all other amendments, the time-frame would depend upon the time taken by the required percentage of Members to submit their acceptances in accordance with their respective constitutional processes.

20. However, events subsequent to the adoption of an amendment can sometimes make this period longer than would otherwise be the case. In the case of the most recent amendment to the Constitution, which involved amending Articles 24 and 25 to add an additional member to the Executive Board, the amendment was adopted at the Thirty-ninth World Health Assembly in 1986 and did not enter into force until 1994. One of the factors in creating such a delay was the intervening growth in the size of the Organization. In 1986 there were 168 Members, thereby requiring subsequent acceptances from only 112 Member States, whereas by the time two-thirds of the Members had submitted acceptances based on the then current membership, there were 189 Members of the Organization, thereby requiring 126 acceptances.

21. As a result, during the discussions of the Board at its 102nd session at least one member queried whether the Constitution could not be amended so that in the future the requirement to receive subsequent acceptances from two-thirds of the membership would be judged on the basis of the membership at the time the amendment was adopted by the Health Assembly. There is nothing in international law that would prevent Member States from agreeing upon such an amendment and having it implemented once it has entered into force. In order to ensure that the depository of the WHO Constitution would take the same view, this position has now been confirmed with the Office of Legal Affairs of the United Nations. The one member of the group who commented on this issue felt that it could be an acceptable solution, provided that in calculating the subsequent acceptances needed for entry-into-force, only those Member States which were Members at the time of adoption by the Health Assembly would be counted.

**What arrangements would there be to follow up with Member States the submission of the acceptances?**

22. All Member States receive copies of all resolutions adopted by the Health Assembly and, in the case of an adopted amendment, they receive a special notification informing them of the acceptance procedure for entry-into-force. From time to time either the Health Assembly or the Executive Board have requested the Director-General to remind Member States of the need to submit acceptances of an amendment to the Constitution. However, the Health Assembly may, at the time of adopting an amendment, not only specify that the Director-General should especially inform Member States of the adoption, but also remind annually those Member States that have not submitted their acceptances of the need to do so in order for the amendment to enter into force. This proposal received support during the exchange of views by members of the group.

**ACTION BY THE EXECUTIVE BOARD**

23. The Board may wish to consider the proposal to amend Article 73 of the Constitution in light of the further analysis and comments of the members of the informal “virtual” working group set forth above. It would seem that there was no clear support for the establishment of a category of amendments that could, if adopted by a sufficiently large majority of the Health Assembly, enter into force without the need for any subsequent acceptance by Member States (category 1). Rather, based on the views expressed in the group, it would appear that the possible establishment of a reduced percentage of acceptances by Member States after adoption by a particularly large majority in the Health Assembly is as much as may be feasible to propose (category 2). Even in this case there may be objections from some Member States. Consequently, the Board may wish to concentrate on ways in which to speed up the entry-into-force of amendments to the Constitution in categories 2 and 3, together with the proposal to base the percentage of acceptances necessary for entry-into-force on the membership of the Organization at the time of adoption by the Health Assembly.

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